UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA,)
Complainant,)
)
) 8 U.S.C. § 1324b Proceeding
v.) OCAHO Case No. 99B00060
)
PATROL & GUARD) MARVIN H. MORSE
ENTERPRISES, INC.,) Administrative Law Judge
Respondent.)
_______________________________)

THIRD PREHEARING CONFERENCE REPORT AND ORDER, AND ORDER ON PROCEDURE

(April 4, 2000)

I. *PREHEARING CONFERENCE REPORT AND ORDER*

On March 24, 2000, Respondent (Patrol & Guard), by counsel, Charles G. Slepian (Slepian), filed a letter-pleading dated March 22, 2000, which took exception to "the unorthodox manner" in which Complainant, i.e., the Office of Special Counsel (OSC), was making inquiries of Respondent's employees. Slepian wrote that although, in his words, "the investigative stage of this matter has long been concluded," OSC was advising the employees that its inquiry was pursuant to a "current" investigation. Respondent's letter-pleading attached (as Exhibit A) an OSC letter dated March 16, 2000, addressed to Thomas F. Caulfield, identified (by OSC at the conference) as one of Respondent's supervisory employees. The OSC letter to Caulfield contained a reminder that during OSC's "investigation of Patrol & Guard we were provided with a copy of your I–9, [and] would like to ask you some questions about what you were told when you filled out the form." OSC advised that it was not looking into the addressee's employment eligibility, but "are only investigating the *process* by the employer to verify the employment eligibility of applicants in general."

Respondent's letter-pleading included a request for an urgent prehearing conference, and was accepted as a motion to schedule such a conference. 28 C.F.R. § 68.13(a)(1). With the cooperation of counsel for both parties, the third telephonic prehearing conference was held on Tuesday, March 28, 2000. During the conference:

1. I reminded the parties that this case, limited to Count II [1] of the Complaint, is an adjudicatory proceeding. Therefore, the appropriate guidelines for the parties' communications and actions are the rules of discovery, formal or informal, and not those for OSC as investigator and Respondent as an employer being investigated.[2] The statute clearly delineates the investigatory period to precede the filing of the complaint which initiates the proceeding. 8 U.S.C. § 1324b(d)(1)(2). "A federal agency is not permitted to ignore statutory mandates. Federal agencies, whether created by statute or Executive Order, are free to give reasonable scope to the terms conferring their authority, but they are not free to ignore plain limitations on such authority." *United States v. Hyatt Regency Lake Tahoe,* 6 OCAHO 861, (1996), *available in* 1996 WL 430388, at *8 (O.C.A.H.O.) citing *Peters v. Hobby,* 349 U.S. 331, 345 (1955).

It cannot be supposed that Congress had imprecise purposes in mind when it identified and specified time frames for OSC's investigation/notification period. As stated in *United States v. Workrite Uniform Co.,* 5 OCAHO 755, at 268 [3] (1995), *available*

[1] Count II alleges that Respondent's pattern or practice of selectively and intentionally demanding INS documentation from only those applicants it perceives to be non-U.S. citizens "constitutes an unfair immigration-related documentary practice" with respect to work-authorized individuals "in violation of 8 U.S.C. § 1324b(a)(6) and 28 C.F.R. § 44.200(a)(3)."

[2] The Department of Justice commentary on promulgating 28 C.F.R. § 44.302 (Investigation) is instructive in distinguishing the investigative from the adjudicatory stage. "One commenter urged that respondents be permitted to engage in discovery upon acceptance of a charge by the Special Counsel. We believe, however, that such discovery would be inappropriate while the Special Counsel is discharging his or her investigatory responsibilities under the Act. Respondents, of course will be entitled to discovery once a complaint is filed with an administrative law judge." 52 FR 37408 (1987).

[3] Citations to OCAHO precedent refer to volume and consecutive reprint number assigned to decisions and orders. Pinpoint citations to precedents in Volumes 1 and 2, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS AND UNFAIR IMMIGRATION-RELATED EMPLOYMENT PRACTICES LAWS OF THE UNITED STATES, and Volumes 3 through 7, ADMINISTRATIVE DECISIONS UNDER EMPLOYER SANCTIONS, UNFAIR IMMIGRATION-RELATED EMPLOY-

in 1995 WL 429047 at *2 (O.C.A.H.O.), if Congressionally mandated § 1324b procedures were merely guidelines, "OSC would be free to tarry . . . and indefinitely and ambiguously [extend] its investigatory period into perpetuity."

During the conference, one of the two participating OSC attorneys stated that the term "investigation" in the letter to Caulfield was not intended in the technical sense of that term. I cautioned that to approach employees utilizing "investigatory" terminology introduced confusion as to whether the parties are in an adjudicatory or an investigatory posture.[4]

If OSC **does** prefer to exercise its investigatory powers as distinct from preparing for hearing, it has the option, as I stated at the conference, of obtaining dismissal of Count II, and proceeding with an investigation. Title 8 U.S.C. § 1324b(d)(1) provides clear authority to OSC to conduct an investigation on its own initiative, and based on such an investigation, if timely, file a complaint before an administrative law judge (ALJ).

2. In response to my inquiry, OSC advised that it had mailed out twenty to thirty letters of the type sent to Caulfield, without determining in advance which addressees were in managerial or policy-making positions, and who were rank-and-file employees. OSC counsel candidly acknowledged that Caulfield was a supervisor, and that it terminated telephonic discussion with Caulfield, and others, after learning on inquiry that the individual was a supervisor or manager. At my request, OSC agreed to refrain from sending additional letters of investigation in this proceeding. I advised that interviews with employees responding to its out-

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MENT PRACTICES AND CIVIL PENALTY DOCUMENT FRAUD LAW OF THE UNITED STATES are to specific pages, seriatim of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume VII are to pages within the original issuances.

[4] OSC had available other less ambiguous terminology. For example, in a proposed notice seeking information from potentially affected individuals in an earlier 8 U.S.C. § 1324b pattern or practice claim, OSC recited:

> The U.S. Department of Justice is **involved in legal action against** __________, alleging that __________ hiring procedures are discriminatory [. . .]. If you [. . .], the Department of Justice needs to talk to you about [. . .]. Please call Ms. ____________, U.S. Department of Justice, (toll free) at 1–800–___–___. You may call in any language. [. . .] Please note that the Department of Justice's complaint is only an allegation and no finding has been made by any judge as to whether [. . .] has illegally discriminated.

United States v. Agripac, Inc., 8 OCAHO 1012, at 2–3 (1998), *available in* 1998 WL 804710, at *2 (O.C.A.H.O.). [Emphasis added].

standing letters be conducted on notice to Respondent's counsel with an opportunity for him or his representative to be present. 28 C.F.R. § 68.18(a).

OSC rejected that advice, instead inviting me to address the parameters of OSC investigative authority, expressing concern that any limitation by the administrative law judge on OSC investigatory prerogatives exceeds adjudicatory power. I declined that invitation, and I reminded counsel that we were in agreement that this proceeding was now at an adjudicatory stage. I reiterated that in the present posture of this case, OSC should proceed by discovery in preparation for hearing, and not in an investigative mode.

3. Principles of fairness and accepted practice in litigation in dealing with employees of an adversary party dictate the guidelines of discovery. Containing the information-gathering efforts within the bounds of discovery helps to avoid a practice, whether or not inadvertent, of directly contacting Patrol's managers or policy makers (i.e., those who could bind the employer absent assistance of counsel).

This is not a case of OSC attempting to contact non-employees who may have been adversely affected by Respondent's alleged discriminatory practices. *See Agripac,* 8 OCAHO 1012, at 7, *available in* 1998 WL 804710 at *5. Respondent expresses the legitimate concerns of an employer seeking to restrict opposing counsel's ex parte communications with its current workforce. See *Hoffman v. United Telecomm., Inc.,* 111 F.R.D. 332, 336 (D.Kan.1986).

The *Hoffman* court refused to judicially sanction a proposed letter, stating,

> In the opinion of the court use of the particular letter and questionnaire, as plaintiffs propose, would create a substantial risk of causing confusion, misunderstanding about the case, and unnecessary disruption to the business operations of defendants and working relationships of employees. The documents bear the official seal and letterhead of the EEOC and thus the appearance of official governmental authority for their contents. Plaintiffs have access to alternative procedures for obtaining relevant information. These procedures include depositions, either oral or by written questions. These alternatives may indeed be more expensive and time consuming. Expense and expedition of discovery, of course, are legitimate concerns. Nevertheless, they should not outweigh concerns of fundamental fairness for all parties and avoid the threat of damaging disruptions to normal, reasonable business operations.

I acknowledge Respondent's concerns.

4. I urged counsel in the second prehearing conference of March 29, 2000, to attempt to engage in discovery in preparation for hearing in a collegial and informal mode. In contrast, despite repeated informal requests by Respondent for OSC to identify the twenty-three or twenty-four individuals on whose behalf Count II is supposedly premised, OSC has insisted it would only divulge such information in response to formal discovery, an intransigence for which I made my distaste known. That being OSC's position, however, it appears that the rules of formal discovery must serve to guide these proceedings until the discovery period closes. 28 C.F.R. § 68.18.

II. *OSC'S LETTER-PLEADING FILED MARCH 29, 2000*

Following the March 28, 2000 prehearing conference, while the report and order was being written, counsel for OSC filed a gratuitous letter-pleading by facsimile transmission.

Both the OSC letter-pleading and Respondent's letter-pleading filed March 24, 2000, are in derogation of the requirement at 28 C.F.R. § 68.11(a), that any "request" be submitted in the form of a motion.

In addition, the OSC filing is procedurally defective, in violation of the Rules of Practice and Procedure of this Office, for lack of a certificate of service and for filing an insufficient number of copies, 28 C.F.R. § 68.6(a), and for facsimile filing absent a justification for filing by that means (i.e, "to toll the running of a time limit"), 28 C.F.R. § 68.6(c). The Rules are designed to obtain professionalism and uniformity so as to assist the administration of justice. The Rules apart, I discourage filings by members of the bar that do not conform to traditional standards of practice and professionalism. While I accept the OSC letter-pleading for purposes of this order, I will expect counsel to adhere to established norms.

OSC characterizes its March 29 filing as "clarifying [its] position" with regard to "issues discussed during the telephonic conference." Subsequent paragraphs of OSC's letter focused on OSC's strategies for contacting potential witnesses. The conference, however, did **not** address the issue of contacting and interviewing potential witnesses.

The faxed filing reflects OSC counsel's sense of urgency to affirm its "position concerning the rights of this Office under the statute as well as under time-honored practice." However, the OSC filing is a sua sponte assertion of misplaced investigative authority. OSC ambiguously describes its conduct with respect to the Respondent's personnel as if it is engaging in third-party witness preparation, rather than as an ongoing investigation which is what its inquiry to Respondent's employees plainly appears to be. Soliciting information from employees is an appropriate exercise of broad investigatory powers in an investigative stage, and is a distinct and separate activity from inquiring of an employer to identify rank-and-file employees who may be potential witnesses in a hearing, and then contacting such witnesses during an adjudicative proceeding. Either counsel is confusing the two, or is attempting a second engagement of the ALJ in a confrontation over the limits of OSC power, and is abjuring the maxim that "hard cases make hard law."

I treat OSC's filing as a motion that the judge consider its proposal for clarification. As a motion, I find it wanting both in its mis-characterization of what I said at the conference, and in its failure to recognize, in the context of litigation, the difference in treatment by a party litigant of employees of an adverse party on the one hand and third-party witnesses on the other hand. At the conference, OSC counsel was explicit in expressing the right to continue its investigation. I was equally explicit in asserting judicial authority to establish the parameters of the adjudicatory proceeding, making clear that investigatory actions are not the appropriate vehicle for generating evidence with respect to the surviving count of the Complaint before me. During the conference, I stated my expectation that interviews of those employees already contacted by means of OSC's letter of inquiry be conducted on notice to Respondent's counsel. I do not understand how OSC counsel made the leap from (i) the adjudicator's stating an expectation as to employees, to (ii) an alleged demand for an agreement "not to contact or informally interview **potential witnesses** without first notifying Respondent's Counsel." [Emphasis added].

I reject as a matter of law the claim that OSC may with impunity deal free hand with Respondent's employees simply by exercising a semantic tactic of reclassifying them as witnesses.

OSC's filing correctly recalls my observation that, in counsel's words, "as this case is now in the discovery stage, OSC should

adhere to the 'conventional mode' of discovery." But counsel is in error in asserting that, in the "view" of the judge, conventional discovery "would preclude this Office from contacting **any potential witness** without first notifying Respondent's counsel . . . and giving him am opportunity to participate in any interview we conduct of such witness." [Emphasis added]. The focus of the conference, and of my exhortation that OSC prepare for hearing utilizing discovery norms, was on employees of Respondent, not on witnesses generally.

Title 8 U.S.C. § 1324b(f)(2) reflects the demarcation between investigations and hearings. OSC initiated the hearing by filing its Complaint. 8 U.S.C. § 1324b(e). Invoking ALJ jurisdiction, OSC has subjected its case to the Administrative Procedure Act (APA). The Supreme Court makes clear that "when conducting a hearing under § 5 of the APA, 5 U.S.C. § 554," the ALJ "is not responsible to, or subject to the supervision or direction of employees or agents engaged in the performance of investigative or prosecutorial functions for the agency." *Butz v. Economou,* 438 U.S. 478, 514 (1978). The Court found that the role of the ALJ is "functionally comparable" to that of a judge. *Id.,* at 513. As applied to § 1324b, the judge, not the lawyer, has "all appropriate powers necessary to conduct fair and impartial hearings," as more particularly set forth at 28 C.F.R. § 68.28(a). It is for the lawyer to define and provide substance to the theory and parameters of the client's case. It is for the judge to regulate the course of the proceeding. *Butz,* 438 U.S. at 513; 5 U.S.C. § 556(c). Counsel cannot in the guise of purported clarification overtake the role of the judge.

Upon filing its Complaint under 8 U.S.C. § 1324b, OSC surrendered its § 1324b(d)(1) power of investigation. Subsection (d)(1) provides that OSC "shall investigate each charge received and, within 120 days . . . of the charge, determine . . . whether or not to bring a complaint . . . before an administrative law judge." Alternatively, "the Special Counsel may, on his own initiative, conduct investigations . . . and, based on such an investigation . . . file a complaint before such a judge." If within 120 days after receiving a charge OSC has not filed a complaint, OSC "shall notify" the charging party that a private complaint may be filed "within 90 days after the date of receipt of the notice." 8 U.S.C. §§ 1324b(d)(2). Significantly, subsection (d)(2) provides that failure by OSC to file a complaint within "such 120-day period shall not affect the right of the Special Counsel **to investigate the charge or to**

bring a complaint before an [ALJ] during such 90-day period." [Emphasis added].

Title 8 U.S.C. § 1324b(d) establishes a clear symmetry between OSC investigation of unfair immigration-related employment practices, and ALJ jurisdiction over complaints alleging § 1324b violations. The purpose of OSC investigation is to determine (1) "whether or not there is reasonable cause to believe that the charge is true" and (2) "whether or not to bring a complaint." Absent a charge, OSC may nevertheless investigate, on which basis it may file a complaint. Whether or not there has been a charge, the purpose of the authority to investigate is satisfied once OSC files its complaint.

The potential for mischief resulting from conflating OSC inquiry of Patrol & Guard employees in contrast to third-party witnesses is illustrated by the Caulfield situation where OSC sought out a managerial individual without first taking the routine precaution of inquiring whether he was a rank-and- file or managerial individual.

There should be no confusion in the respective roles of OSC on one hand as the program agency responsible for enforcement of the statutory prohibition against unfair immigration-related employment practices, and on the other hand of the adjudicator before whom OSC files a complaint. Once the program agency, acting within statutory time constraints, files its complaint, it is subject to the adjudicator's exercise of responsibility with respect to the hearing process, including oversight of trial preparation in the form of discovery, and not investigation.

The Rules provide for full discovery subject to control of the ALJ. 28 C.F.R. §§ 68.18–68.24; see particularly, § 68.18(b). OSC need not be frustrated in its preparation for hearing. OCAHO Rules of Practice and Procedure authorize perhaps the broadest discovery available in any APA administrative litigation.

III. *ORDER*

1. At both the second and third telephonic prehearing conferences, I urged counsel to proceed in a spirit of comity, suggesting, for example, the suitability of informal discovery, and urged OSC to identify to Respondent the individuals whose Form I–9 processing is implicated by Count II. Despite my requests,

OSC conceded that it would produce such identification in formal discovery, but not otherwise. In that light, this order directs Complainant to provide such identification to counsel for Respondent not later than Tuesday, April 18, 2000.

2. Not later than Monday, May 1, 2000, the parties will be expected to file a joint pleading containing proposed discovery cutoff dates. Failing agreement between them as to such dates, each will file a pleading which contains its proposed schedule and reports on efforts to achieve agreement.

3. Respondent's motion for acceptance of a proposed clarification of its position is denied. This order contains all the clarification that is appropriate.

4. The fourth telephonic prehearing conference, in the nature of a status conference, remains as scheduled for Thursday, May 11, 2000, at 10:00 a.m., EDT. The tentative hearing date remains as scheduled, beginning Monday, August 11, 2000, in New York, New York, at a location to be arranged.

SO ORDERED.

Dated and entered this 4th day of April, 2000.

Marvin H. Morse
Administrative Law Judge